principles of the common law, in contending for their retention in this country, and are deemed appropriate in this connection.

31. "Common law," says the learned pamphleteer, "is but another name for common sense, tested and systematically arranged by long experience. What governs the manners of men towards each other? It is the common law of social intercourse. What constitutes the habits and customs of a country, but a common law, gradually growing with civilization, and always accommodating itself to the situation of the people? Nor is the common law of jurisprudence less pliable. It is one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions:" 5 Law Tracts 21, 22. And, again by the common law "every crime is now defined with mathematical certainty; and all its various modifications, shapes and circumstances, defences and palliations, distinctly provided for, either by general rules and principles, or by particular decisions. So of the modes of trial, the competency, credibility, and examination of witnesses. Everything is so constructed as to shield innocence from corrupt persecution, and to bring the guilty to punishment; at least as far as human means can effect it:" Ibid. 58.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

KEVILL *v.* KEVILL.

Gross inequality, apparently unjust or unreasonable, is not alone sufficient to invalidate a will.

But it is entitled to weight as evidence of testamentary incapacity or undue influence.

These principles applied to the facts of the case.

APPEAL from the Caldwell Circuit Court.

Thomas Kevill, of Caldwell county, Ky., in June 1855, when he was seventy-one years old, published, as his will, a testamentary document whereby he disposed of his whole estate, worth $50,000, unequally among his children by two wives, giving to those of his first wife comparatively but little, and the residue to

those of his then-living wife, to whom he devised the most of it during her life. After probate in the County Court, the document was re-contested in the Circuit Court for the alleged incapacity of the testator and imputed control of his wife. The jury found a verdict against it, and the court thereupon adjudged that it was not his will, and overruled a motion for a new trial. From that judgment both parties appealed, the unsuccessful party because, as alleged, the verdict was not authorized by the evidence, and the successful party, because the court refused a new trial on the discovery of additional evidence against the will.

John L. Scott, in support of the will.

Harlan, Attorney-General, contrà.

The opinion of the court was delivered, October 9th 1866, by

ROBERTSON, J.—Admitting that, anomalous as the procedure in this case certainly is, the party succeeding on the issue might be entitled to a new trial for the purpose of making the case stronger in the Appellate Court, nevertheless the discovered testimony in this case, being only slightly cumulative, was of such a character as not to have sustained a verdict which, without it, should be set aside as unauthorized by the evidence heard by the jury; wherefore we cannot grant a new trial to the appellants, who obtained the judgment in the Circuit Court.

But, in our opinion, the Circuit Court erred in refusing a new trial to the other party.

Gross inequality, apparently unjust or unreasonable, is not alone sufficient to invalidate a will which otherwise would be unassailable. The testamentary power is of great value in both its enjoyment and its results, and therefore it should be well guarded by the law and sternly upheld by the judiciary. Every competent and self-poised mind has, and should always have, an unquestionable right to make *its own will* according to the law of the land, and no person, either wife or child, has any legal right to deny that conservative power or gainsay the free and voluntary exercise of it. But apparent inequality or unreasonableness in a testamentary disposition is entitled, in proportion to its degree of flagrancy, to some auxiliary influence on the question of capacity or fraud or controlling influence, and, unexplained and combined with other corroborating evidence, it may be entitled to great influence.

This is the uniform and undeviating doctrine of this court, and it was never, in any instance when rightly understood, adjudged otherwise.

The apparent inequality in Kevill's will may in some degree be reconciled with parental justice and impartiality by the fact that when the testator married his last wife he was comparatively poor; considerably increasing his estate as he did by the accession of her property, he may have thought it his duty to give to her children the value of her original property and its increase. But, however this prudential consideration might have operated, the apparent inequality on the face of the will is not sufficiently fortified by other evidence of incapacity or sinister influence to invalidate it as the testator's last testament.

Few wills have ever been sustained by more consistent and satisfactory evidence of testamentary capacity. The writer of the will testified that the testator dictated and fully explained every provision and was clearly of sound and disposing mind. Three other subscribing witnesses testified to his capacity with equal confidence. And all these witnesses had been long and intimately acquainted with the testator. Several other like acquaintances fully and confidently concurred in favor of his capacity, which is also corroborated by proof of his provident and successful attention to his business even after the publication of his will, and nearly or quite to his death, seven years afterwards. This mass of opinions and facts, made almost conclusive by the internal proof arising from the testator's calm and intelligent dictation of a will so minute and elaborate, is scarcely affected, in any rational degree, by any opposing opinions or facts concerning capacity. Indeed, when carefully analyzed, the opposing testimony does not essentially impair the overwhelming evidence of capacity at the date of the will, but may be consistent with it.

We are, therefore, of the opinion that the will is unimpeachable for want of disposing mind.

On the question of the wife's imputed influence, there is some doubt, but not enough to sustain the judgment against the will. The effect of all the testimony on this point is only that the wife had certainly some and probably great influence over the testator's mind in concerns of trivial importance. But it fails to show any instance of the successful or sinister exercise of it in *any*

important matters. On the contrary, all the testimony exhibits him as a man of sound judgment and strong self-will in all important concerns. Now, although it may be true that stepmothers often feel jealous of their husband's children by other wives, and sometimes successfully plot dissension and alienation, and even though there may be some ground for *suspecting* that this case may afford some illustration of that fact, yet there is certainly no proof of it, or of the exercise of any subjugating influence in the moulding of the will of Thomas Kevill.

Wherefore the judgment setting aside the will is reversed, and the will is established by the judgment of this court, and the cause remanded to the Circuit Court, with instructions to set aside the verdict and judgment in that court and certify this judgment to the County Court.

The fact that the foregoing case seems to assume grounds, in some respect, different from those maintained in the majority of cases involving similar questions, will not render it of less interest to the profession. A somewhat extensive and careful study of cases bearing upon analogous questions, and large experience in the trial of similar cases, has convinced us that it is not practicable to lay down any general rule in regard to them which will not require frequent and marked modification in its practical application.

The learned judge places great reliance upon two facts as tending to show that there was no satisfactory proof of *undue* influence in the case: 1. That the testator, although more than seventy years old, was possessed of abundant capacity to execute a will of the character in question, understandingly, when left to his own free will and voluntary action. 2. That although his wife had confessedly very controlling influence upon his mind, in matters of trivial concern, the evidence failed to show any instance of such influence of a sinister character "*in any important matters*." It is also stated, as the result of the evidence, that in *all important matters* the testator was a man of sound judgment and strong self-will. Considerable reliance is also placed upon the fact that the testator dictated the will in such a manner as to show evident capacity and the most unquestionable freedom of action. It is confessedly true that these considerations have an important bearing upon the question of *undue* influence in the factum of a will.

But there are two species of influence in the production of a will which may properly be regarded as undue. One where the testator is a mere passive instrument in the hands of those who produce the will; the other where he lacks that active control in the affairs of his household which enables him with reasonable firmness to resist the importunities and especially the dictation and offensive annoyances of those about him who desire to control the disposition of his estate, and where he is consequently driven by the dread of such silent but intolerable grievances to make such a will as he understands will alone give him quiet and peace.

In regard to the former species of influence, this case is certainly free from all question, and it would rather seem that most of the argument of the court

is directed towards rebutting any inference of that species of influence. But in regard to the other kind of influence, it does not appear to us the case is equally free from all doubt.

The testator was aged, and unquestionably, to some extent, infirm both in body and mind; he was living with a second wife who clearly had very marked influence over him; he made a will giving most of his property to the children of the second marriage, to the virtual disinheritance of those of the first marriage.

Here, then, was a clear case of an unequal and, on general principles of natural justice, an unjust distribution of property among those equally entitled to the testator's bounty. The will, then, was of that character which if produced by any extraneous influence, such influence would be regarded as *undue influence*. For it is not the extent, but the character of the influence, which the law regards as unlawful. A wife or a child has the legitimate right to influence the husband or parent to the extent of doing justice. And although it should be shown that without such influence the will would not have been made or would have been differently made, it will nevertheless be valid if it be not in any marked degree unequal and unjust. But the same degree of influence, when exerted to produce a vicious result—an unequal or unjust distribution of the estate among those equally entitled—would be held unlawful, or what the law denominates "undue influence."

We have examined the authorities and the principles involved in this and kindred inquiries in the first part of our work on Wills, § 38, pp. 507–538, where it is shown that undue influence partakes partly of the nature of fraud; and if the person in favor of whose influence the will is made, either for his own benefit or that of others, is conscious, as a person of common experience and wisdom must be presumed to have been conscious, that an unjust result was being obtained in having the will made as it was, and such result is secured by personal solicitation or influence of any kind, although not by words or by any distinctive and definable acts, still if such result is attained through the agency of other minds than that of the testator, the will cannot be maintained. This is well illustrated by *Gilbreath* v. *Gilbreath*, 4 Jones's Eq. 142; *Dean* v. *Negley*, 41 Penn. St. 312; *Floyd* v. *Floyd*, 3 Strobh. 44; *Woodward* v. *Jones*, Id. 552; *Means* v. *Means*, 5 Id. 167. The cases bearing upon this point are too numerous to be here referred to. They are cited very much in detail in the treatise above referred to.

The precise degree of proof required to establish undue influence it is not easy to define. It is generally held that a will proved to have been understandingly executed, although in favor of a stranger, to the exclusion of near relatives, is *primâ facie* valid, and that those who oppose the will must show distinct grounds upon which it should be set aside: *Sechrest* v. *Edwards*, 4 Met. (Ky.) R. 163. But in a later case in this same state (*Harrel* v. *Harrel*, 1 Duvall 203) it is said: Gross inequality in the dispositions of the instrument, where no reason for it is suggested either in the will or otherwise, may change the burden and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly-disposing mind. But it must appear, either by direct proof or reasonable presumption, that the will is not truly that of the testator, freely and understandingly made. The character of the will, as applied to the testator's character and surroundings, may show this as fully as more direct and express testimony. But, in general, no doubt, there should be proof of

distinct effort (and under such circumstances as to raise the presumption that it became successful) to produce a different will from what the testator would otherwise have made, in order to invalidate the instrument.

But in cases where the testator is confessedly under the control and influence of the principal legatee, and especially if the testator were laboring under infirmity or disability, as if his mind were enfeebled, or he were deficient in one or more of the important senses, or if he were deaf and dumb, or blind, or unable to read writing from defect of education, the courts have very justly exercised great circumspection to have it appear by satisfactory proof that the instrument was understandingly made. And in many cases it has been determined by courts of authority that in this class of cases if the will is unequal, and especially if it is unnatural, by the disinheritance of the children of the testator, it cannot be maintained unless the proof removes all reasonable doubt or suspicion in regard to it having been freely and understandingly made by the testator. By this we do not of course understand that the courts making such declarations of the rule of evidence intend to require exactly the same measure of proof in such cases as in criminal cases. But where the facts surrounding any claim tend to excite just suspicion that there is something factitious in its character, that implication should be entirely removed. And so long as any claim is presented in a questionable guise, to any extent, it ought not to receive the indorsement of the courts until that characteristic is satisfactorily explained and removed. These views are abundantly and ably maintained by the opinion of the court in *Watterson* v. *Watterson*, 1 Head. 1.

I. F. R.

Supreme Court of Connecticut.

JOHN R. BURROWS *v.* NEHEMIAH M. GALLUP AND ANOTHER.

Where the owner of land has been dispossessed, a mere casual or stealthy entry by him does not disturb the adverse possession of the disseisor. His entry must be intended as an act of possession.

Where therefore the court charged the jury that a party who claimed a prescriptive right to a public landing must have excluded the public and every member of it, it was held that the charge was open to exception, as implying an actual exclusion of every member of the public from the premises, while it should have required only an exclusion from the possession.

Where a highway is laid out to navigable water and there terminates, the terminus may be regarded as presumably intended for a public landing as incident to the highway.

Where, however, a highway, running from place to place, is laid out along the shore of a navigable stream and in immediate contact with it for a considerable distance, the reason for the presumption does not exist.

The question in such a case depends on the circumstances, and is one of fact for the jury.

It seems that the statute (Rev. Stat., tit. 38, § 3), which provides that no person shall acquire title by adverse possession to land belonging to a highway, does not apply to a public landing not part of a highway.

TRESPASS for entering upon a wharf on Mystic River, claimed by the plaintiff as his private property; tried to the jury in the Superior Court, before BUTLER, J., on the general issue, with notice that proof would be offered that the locus was a public highway and landing.

On the trial it appeared that the wharf was erected by Enoch Burrows, the grandfather of the plaintiff, adjoining the travelled path of an ancient highway, and between that and Mystic River, opposite the family homestead. The acts charged, which consisted of the unlading and deposit of sea-weed upon the wharf, were admitted, and the defence was that the wharf was built by Burrows on a public landing-place, recognising the rights of the public, for more convenient use by the public and himself; he then having a store and doing a mercantile business in the immediate vicinity. The plaintiff proved a continued use of the wharf by Burrows and his descendants, to the time of the supposed trespass. The defendants claimed to have proved that it was originally a landing-place, that Enoch Burrows admitted it to be such, expressly when he built the wharf, and said that he built it for the accommodation of the public as well as himself, and afterward impliedly in a written communication to the town, and that it had always been used as such by the public when they had occasion to use it, and, among other purposes, for the purpose for which the defendants used it. The plaintiff denied that it was or ever had been a public landing-place, and claimed to have proved that the landing-place was below; that he had title to the land where the wharf was built; and if not, and if originally a landing-place, that it was an easement distinct from the highway, and not embraced by the statute of 1809; and that he and those under whom he claimed had, by an exclusive possession, gained a title as against the public, notwithstanding that statute. Both parties requested the court to charge in conformity with their respective claims. The charge of the court was *pro forma* on all the points, and as follows on the point of title by adverse possession:—"The plaintiff claims that if a public landing-place originally, yet if, since the wharf was built, he, and those under whom he claims, have been in the exclusive possession, they have

destroyed the public right by fifteen years adverse user. If there was a landing-place, and it was an easement distinct from the highway, it was not within the statute, and if they occupied exclusively for fifteen years they extinguished the public right. The plaintiff claims that he and his grantors have thus occupied, and that the user, so far as there has been any by the public, has been permissive; that permission was generally asked, and if not the public understood that the plaintiff and his grantors permitted the public to use it. The defendants claim that it was not permissive; that Enoch Burrows, when he built it, said that he did not intend to exclude the public, and that such was the import of his admission in the communication to the town. You will look at the writing in connection with the evidence, and say whether it related to this place. And you will look at all the evidence and say whether there has been an exclusion of the public, and whether the public use has been all permissive. In order to destroy the public right they must have excluded the public and every member of it. The defendants claim that a large number of persons have continued to use it, claiming it as a matter of right, and that there has been no fencing or actual exclusion, and that the plaintiff and his grantor never took possession intending to exclude the public. Have the public been substantially excluded from the place? If so, the public have lost their rights; if not, they could not lose them."

The jury returned a verdict for the defendants, and the plaintiff moved for a new trial for error in the charge.

Hovey and *Wait*, with whom was *A. F. Park*, in support of the motion.

1. The public have no right, either at common law or by statute, to use the soil of an individual adjoining navigable water as a landing-place: *Ball* v. *Herbert*, 3 T. R. 253; *Blundell* v. *Catterall*, 5 Barn. & Ald. 268; *Pearsall* v. *Post*, 20 Wend. 111; *Post* v. *Pearsall*, 22 Id. 425; Angell on Tide Waters 178, 185, 189. Nor can they acquire such right by dedication, for dedication is predicable only of highways, streets, and other easements in the nature of highways: *Post* v. *Pearsall*, 22 Wend. 425. Nor by prescription, because prescription is a personal right, and the public cannot prescribe for an easement: 3 Cruise Dig. 424; 2 Greenl. Ev., §§ 248, 540; 2 Bla. Com. 263, 264. Nor can the public in any way acquire the right, except through the action

of the legislature. Custom may give to the inhabitants of a particular town or village this right; but custom cannot be pleaded in favor of the whole community: 2 Greenl. Ev., § 248. And individuals may acquire the right by prescription.

2. If the *locus in quo* ever was a landing-place which the public had the right to use as claimed by the defendants, the provisions of the statute for preventing persons from acquiring title to public highways by adverse enjoyment do not apply to it: Rev. Stat., tit. 38, § 3.

3. To destroy such right of landing the occupation of Burrows need be such only as to substantially exclude the public from enjoying the same as a matter of right. To make the rule so sweeping as to require the exclusion of *every human being*, would prevent the acquisition of a title to places which had been used as public landings, as effectually as if there existed a statute applicable to landing-places similar to the Act of 1809 relating to highways, and the Act of 1846 relating to railroads and canals.

4. Even if any individual did land there claiming that he had the right so to do as one of the public, the exercise of such claimed right would not prevent Burrows holding the premises by adverse possession against the public, but only as against the individual who so landed. Therefore if Gallup landed the sea weed on the *locus in quo* under a claim of right, it was a personal right merely and not a public one.

Lippitt and *Halsey*, contrà.

1. A mere use of the *locus in quo* conferred no *exclusive* right so to use it. It was but the exercise of a *common* right. To acquire an exclusive right to that which before was public and common, it must be exercised to the exclusion of all others. A mixed use is not sufficient: 1 Swift Dig. 161; Washburn on Easements 412, 413; *Nichols* v. *Gates*, 1 Conn. 318; *Chalker* v. *Dickinson*, Id. 382; *Delaware and Maryland Railroad Co.* v. *Stump*, 8 Gill. & J. 479; *Collins* v. *Benbury*, 5 Ired. 118; *Rogers* v. *Allen*, 1 Camp. 309.

2. The party who claims the exercise of any right inconsistent with the free enjoyment of a public easement or privilege, must put himself on the ground of prescription, unless he has a grant from the government: 2 Hilliard on Real Property, chap. 60,

§ 11; *Arundel* v. *McCulloch*, 10 Mass. 70; *Carter* v. *Murcot*, 4 Burr. 2164. And it is one of the essential elements of a prescriptive right that it should have been enjoyed to the exclusion of all against whom it is claimed: Washburn on Easements 96; *Kilburn* v. *Adams*, 7 Met. 33.

3. It appears from the whole charge that the jury were properly instructed on this point, so far as any claim of the plaintiff is concerned. The motion merely shows that the plaintiff proved "a *continued* use," not an *exclusive* one. The verdict then is clearly right under any view of the law.

4. The charge was only *pro forma*, to get the opinion of the jury on the character of the possession or use by the plaintiff. The judgment should be for the defendants, however the jury might find in regard to the possession. The highway was laid by "Mystic River side." The charge proceeds upon the theory that the public could lose the use of the *locus in quo*, so far as a right of landing was concerned, but not for the ordinary purposes of a highway. But "where a street is laid out bordering on a navigable water, it will be presumed that it was intended to be dedicated both for a highway and a landing. The navigable water is a highway; and where in contact with this the easement of a street or highway is granted, the very location of the latter shows that it was designed for the purpose of loading and unloading freight, and landing passengers from the water. The dedication to the water *unites* the two easements, each of which is essential to the full enjoyment of the other:" *Godfrey* v. *City of Alton*, 12 Ill. 29. This case is approved by the Supreme Court of Ohio: *Holmes* v. *Railroad Co.*, 8 Am. Law Reg. 729. The law is the same in England: *Peter* v. *Kendal*, 6 Barn. & Cress. 703. Such being the law, it is submitted that, as long as the public had a right to the use of the *locus in quo* as a highway, they had also the right to use it for a landing, which is only passing from one highway to the other. The plaintiff could acquire by occupancy a right against any individual to the fee of the land, but nothing against the public easement: *Read* v. *Leeds*, 19 Conn. 182.

PARK, J.—Complaint is made of the charge of the court to the jury as to what it was necessary for the plaintiff, and the parties under whom he claims title, to have done in order to

extinguish the right of the public to the *locus in quo* as a public landing. The court instructed them "that in order to destroy the public right they must have excluded the public and every member of it." It is said that this language gave the jury to understand that, during the running of the statute, the entry upon the premises of any member of the public, without permission of the party in possession, would prevent the acquisition of a prescriptive right in the plaintiff, whether the entry was made for one purpose or another, and whether by stealth or otherwise. On the other hand it is said that the court, in a subsequent part of the charge, so qualified the language complained of, that the whole is rendered unexceptionable.

It was claimed by the plaintiff, and the court adopted the theory, that if the public had acquired a right to the locus for a public landing, it was such a right as could be lost by prescription. If this be true it is quite evident that the charge was calculated to mislead the jury in determining whether it was lost.

The first part of the charge is specific. It requires the exclusion of every member of the public from the premises. The latter part is more general, and only renders it necessary that the public should be substantially excluded. The first part is more comprehensive than the last. The last does not purport to have been given to qualify or explain the first; neither can it receive that construction. They are independent representations of the law concerning the same subject-matter; and inasmuch as it cannot be known which part of the charge was received by the jury as the law of the case, we are required to consider whether either part gives the plaintiff cause to complain.

A title by prescription is based upon a grant, conclusively presumed from an exclusive adverse possession of premises for a period of fifteen consecutive years. The owner must be ousted and the ouster must continue uninterruptedly for the prescribed period of time. But when a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil and still be as much out of possession of it there as elsewhere. He must assert his claim to the land, perform some act that would reinstate him in possession, before he can regain what he has lost. It is evident, therefore, that an entry by stealth, under circum-

stances that go to show that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of exclusive possession in another.

It is quite probable that the court intended to be understood by the language used in the first part of the charge, that every member of the public must be excluded from the *possession* of the premises; but in common parlance the language would be understood differently. It would be taken to mean a physical exclusion —an exclusion of mere casual entries upon the land, such as have been alluded to; and it may be that the jury found for the defendants solely on this ground.

But the defendants claim that judgment should be rendered in their favor, however the jury might find in regard to the possession. They say that the facts of the case show that the premises in question form a part of a public highway, at its junction with Mystic River, which is a navigable stream; and they claim that where a highway upon land comes in contact with navigable water, it is to be presumed that it was intended to have been dedicated to the uses of a highway and a public landing, and is not therefore the subject of prescription.

Where a highway is laid out to navigable water and there terminates, there could be but little reason to doubt that it was designed for the purpose of loading and unloading freight and landing passengers from the water; and it would thereby become a public landing as an incident to the public highway. But suppose a highway in running from place to place incidentally comes in contact with tide water, and runs along the beach for a considerable distance, on account of facility in its construction or other cause, would the whole length of the highway bordering tide water, which might be many miles, *ipso facto* become a public landing, irrespective of its need or fitness for such a purpose, so that the owner of the soil could not appropriate any part of the shore to his own purposes although the fact was apparent that the public would not be thereby incommoded? If the law is so, a different principle prevails along the line of contact of these highways from that which governs each when separated.

It has been adjudged in many cases that the owner of the soil may do such acts upon his own land, within the limits of a public highway, as do not interfere with the public easement: *Bartlett*

v. *Everts*, 8 Conn. 523; *Burnham* v. *Hotchkiss*, 14 Id. 312; *Hopkins* v. *Crombie*, 4 N. H. 520. And there is abundant authority that the owner of land along the seashore may do in like manner with his soil covered by the sea, if navigation is not thereby incommoded: Angell on Tide Waters 159; *East Haven* v. *Hemingway*, 7 Conn. 186; *Frink* v. *Lawrence*, 20 Id. 118; *Groton* v. *Hurlbut*, 22 Id. 178. The principle running through these cases, and many more that might be cited, is, that what remains, after giving the public full enjoyment of their rights, belongs to the owner of the soil.

And why should not the same principle govern in regard to a public landing arising from the contact of these highways? Can any good reason be given in the case supposed, why the whole length of the contact should perpetually remain a landing, where the supposition is that a small part of it is capable of furnishing, and in fact does furnish, all the conveniences for the full enjoyment of the public right? Can anything more be asked for such a right than full enjoyment? If so it must be to gratify the caprice of same erratic navigator.

It certainly would be a novelty in judicial proceedings if a prosecution could be sustained in such a case against the owner of the soil, who had erected a wharf for his own purposes at a place within the contact, but not required for any public use. Upon what principle the court could declare such erection a nuisance it is not easy to see.

It may be that public landings *primâ facie* exist along the line of contact of all highways with tide water, as incident to such highways, as all water where the tide ebbs and flows is *primâ facie* navigable, notwithstanding its unfitness for navigation in fact. But such general principles of law are brought within the bounds of reason when undergoing judicial examination. Judge ELLSWORTH, in giving the opinion of the court in one of the cases cited, says:—"It is time the public should understand that not every ditch in which the tide ebbs and flows through the extensive salt marshes along the coast, and which serves to admit and drain off the salt water from the marshes, can be considered a navigable stream; nor is every small creek in which a fishing-skiff or gunning-canoe can be made to float deemed navigable; but in order to have this character it must be navigable for some general purpose useful to trade or business." And so it might be

said in relation to landings of the class we are considering, that notwithstanding their *primâ facie* character, they must be needed for public use, and must be restricted in extent to what is beneficial to the public.

The cases cited fully establish the doctrine that the owner of land along the seashore may erect a wharf adjoining his land, and enjoy it as his own, taking care not to interfere with navigation. The enjoyment of a wharf necessarily requires a way, either public or private, connected therewith. Suppose the former exists. Now if the wharf no more interferes with the rights of the public in relation to a landing than it does in regard to navigation, the case clearly comes within the principle of those cases, and the party may enjoy his wharf.

The application of these principles to the case in hand is readily seen and easily made. Although a public landing at the *locus in quo* may have existed *primâ facie*, at the time the plaintiff's ancestor erected the wharf, still, whether it was needed for the purpose, so that the wharf could not become the property of the plaintiff, would depend upon circumstances, and is a question of fact to be determined by the jury. The motion does not state the facts necessary to enable us to decide this question, and to judge, therefore, whether substantial justice has been done by the verdict.

It was stated, however, by the counsel for the defendants, that the highway was laid out in 1698, running "by Mystic River side." If this was so it would seem that the highway runs along the bank of the river for a considerable distance and only incidentally comes in contact with it; for the highway was laid out at a time when it may fairly be inferred that there was not commerce enough on this stream to require the laying out of a highway for its enjoyment.

We cannot say, therefore, that substantial justice has been done in the case, and a majority of the court are of the opinion that a new trial ought to be granted, and so we advise the Superior Court.

In this opinion HINMAN, C. J., and DUTTON, J., concurred. MCCURDY, J., dissented. BUTLER, J., having tried the case in the court below, did not sit.

Supreme Court of Pennsylvania.

LACKAWANNA AND BLOOMSBURG R. R. CO. *v.* CHENOWITH.

The conductor and freight agent of a railroad passenger train, in violation of the regulations of the company, consented to the attachment of a private freight car, under charge of its owner and with an agreement not to be held answerable for any injury resulting from the arrangement. An accident took place, not arising from such act, by which the owner of the private car received personal injury.

Held, that the agreement was not so clearly beyond the powers of the company's servants that their disobedience of the regulations would be a defence in an action by the owner of the private car for damages.

The attachment of the car was too remote a cause of the injury to be a defence on the ground of contributory negligence.

The owner of the private car was a passenger.

Though in Pennsylvania a railroad company is not bound to fence its track to keep off cattle, yet, as between it and its passengers, it takes the risk of injury to them from that cause.

A passenger who leaves his proper place in the car cannot recover for an injury if it was in any degree the result of such act; but if his position was not in any manner the cause of the injury it will not prevent his recovery, and on this point the verdict is conclusive.

ERROR to Common Pleas of Luzerne county.

The opinion of the court was delivered by

THOMPSON, J.—1. The first assignment of error on this record is to that portion of the charge of the learned judge in which he held that the agents of the company, as well as the plaintiffs, acted improperly in attaching freight cars to a passenger train, yet that the company could not repudiate the act so as to free itself from responsibility for negligence on the ground of want of power in their agents.

We think the court committed no error in this. The arrangement was made with parties having full power over the subject-matter; and to them the plaintiff was authorized to look, and was required to look to no other. When, therefore, they consented to hitch on his car to their passenger train, even at his urgent solicitation—and we have not a particle of evidence that other inducements were held out excepting freedom from responsibility as a consequence of the attachment—we must presume that it was done with a view to the compensation to be paid, on the one hand, and the usual care to be exercised, on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for and permitting his car to be attached, that whether the

act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done him. This we think is not the law, except in cases where the will of the agent is controlled by improper influences, or he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight cars with passenger trains may be admitted, although it was not properly proved; yet that neither proved that it might not be safely done, nor that, if the company undertook to do it, they might lay aside the duty of care, and commit such cars to the guardianship of chance. See *Powell* v. *The R. R. Co.*, 8 Casey 414. The great overstatement of the efforts made to induce the defendant to take the plaintiff's cars, is the main pillar upon which the argument against this portion of the charge is constructed. Fairly stated, the facts were that the plaintiff and another were desirous to get to Carlisle by a certain day, and urged to be taken on the train, by the company, as they had missed connecting with the freight train. The conductor and freight agent considered the matter, inquired into the capacity of the cars to run with passenger cars, made up their minds, and took them on their train, on a promise not to be held answerable for any injury resulting from the arrangement. Was the plaintiff put outside the protection of the law, because he trusted to their judgment to do an act within their power to do, and especially when the act itself is not at all implicated in the disaster? *The Railroad* v. *Norton*, 11 Harris 470, gives no support to such a doctrine. It was well decided on its own facts, and in substance, presented the case of an authority given, or claimed to have been given, to obstruct, or imminently endanger the obstruction of, the track. No sane man could suppose the agent of a railroad company had power to give any such authority; and hence a reliance upon it was an act of folly which the law would not compensate. It was palpable to the "outward sense" that such obstruction was unlawful. Not so in this case. The regulations which controlled among the operators of the company were against it, but regulations for convenience may, and oftentimes are, suspended or modified, in obedience to certain exigencies by those in charge of the operations. When this is done, and no evil results, no harm is done. When the contrary is the case, the only rule to apply is to give full effect to the conse-

quences flowing from the act, and no more. Here it is not pretended that these freight cars, the plaintiff's and Hardies's, were the cause of running over the cow in the road; and it cannot be deemed that that was the immediate or proximate cause of the injury. In all cases like this, the maxim "*proxima causa, non remota, spectatur*" rules, and must rule here, unless the unlawfulness of the plaintiff's car, and himself, on the road is established. We think this cannot be alleged by the company under the facts they have given in evidence, and we think there was no error in this part of the charge.

It has been suggested that if the car had not been attached, the plaintiff would not have been injured. Doubtless this is true, and it is true of every injury. In all cases, if the party injured had been absent, it is presumable he would not have been injured by the agency operating. The voluntary presence of the traveller, if not wrongful, is so much a matter of individual choice, that its propriety is never an element to be inquired into in claiming or resisting damages for injury. People have a right to travel where they please, and will be compensated for injuries if occasioned by the negligence of those engaged in transporting them, if they have not contributed to the immediate disaster by their own negligence, whatever might be said against the propriety of the journeying. It is no answer to the plaintiff's claim, therefore, to argue that if he had not had his cars attached, and been present, he would not have been injured. This was, manifestly, not the *proximate cause* of the injury, and not to be considered unless it can be shown that he was a trespasser in being on the train at the time. This he was not, for he was there by permission, and under the control of parties competent to give him authority to be there. His right to damages, therefore, could only be tested by an inquiry into the question of what was the immediate, not the remote cause of the injury. In noticing another assignment of error, we will be brought directly to inquire whether the case was properly dealt with on this ground, and will not further discuss the point here. So far we discover no error in the charge.

2. Nor do we think the second assignment has been sustained. The fair interpretation of the agreement of the plaintiff is, that if the agents of the defendant attached his car to the passenger train, he was to assume the risk of that act; he did not assume

the risk of negligence on their part, nor could they contract for exemption on account of it: *Powell* v. *Penna. R. R. Co.*, 8 Casey 414. The position taken by the learned judge, and noticed above, having placed the case before the jury on its true grounds, in our opinion, namely, on the point of negligence, and not of authority in the agents to engage to transport the plaintiff and his car, his remark that the plaintiff was entitled to recover, if the defendant's negligence was the sole cause of the disaster, was entirely proper. Why speculate about the supposed dangerous position assumed by the plaintiff, if no damage resulted from it? Was he to become an outlaw for merely assuming what proved to be no risk, and so forfeit his rights when he was blameless? I know of no law to justify such a position.

3. In *Lockhart et al.* v. *Lichtenthaler*, 10 Wright 151, s. c., 4 Am. Law Reg. 15, we held that a person in charge of a private car, and acting on it as brakesman, was not a servant of the company, so as to preclude his widow from recovering for the loss of his life by the negligence of the servants of the road. Strictly, a passenger he was not, nor was he a servant of the company, neither earning wages from it nor bound to obey its orders, excepting in regard to the property specially under his charge. We held him entitled to the rights of a passenger so far as injury to him was concerned, and that case rules the present in this particular; and nothing now is needed on this point to show that there was no error in this portion of the charge.

4. To the portion of the charge embraced in the fourth assignment of error, the objection seems to be that it referred the question of negligence, alleged against the company, to the jury without evidence. There was no error in the reference of the question to the jury unless it be shown there was no sufficient evidence of negligence to go to the jury. But there was evidence on this point, unless the passenger was bound to take the risk of cattle on the track, and the company not. Although a railroad may not be bound to protect its road against trespassing cattle, it is well settled that, as between it and its passengers, it must take the risk of injury to them from such cause; and it is no answer to a claim for injury from such a cause, that the defendant was not bound to fence, or that cattle were on their track trespassing without their agency or knowledge. Their being there, at the time of an accident, always raises a question

of negligence or care, and whether negligence is imputable to the company, or whether they have exercised due care to guard against obstruction from such cause, is always, and only, determinable by the jury.

In this case there was an omission to fence at the mouth, or end, of a particular street. Near this was a watchman's station. It was a pertinent inquiry, therefore, whether there was negligence in the company in not fencing at the point mentioned, or whether the fault lay with the watchman, or either. If it lay with one, or both, the plaintiff's case was made out, unless his agency concurred in it. And of this the jury had been instructed to inquire in a previous part of the charge. These facts most certainly carried the case to the jury, and, in instructing them, the court committed no error.

5. As we understand the learned judge, he charged that the fact that the plaintiff, at the moment the accident occurred, was on the rear platform of the last passenger car, did not necessarily carry the case against him; and he gave his views of the law on this point thus: "Yet if, by reason of his not being on his own car, and handling, or ready to handle, his brake, which, if done in due season, or for any other reason, you believe, as argued here, would have lessened the chance of injury from striking the cow by the cars; and as to any claim for personal damage, or injury to his person, if, by the unauthorized change of place, as contended for, he conduced to the danger or the injury, which the jury think, under the evidence, he might have escaped if he had been in his allotted situation, he must and should be considered as guilty, himself, of carelessness and negligence conducive to the accident or injury."

The complaint that the charge lacks perspicuity, and is ambiguous, is, to some extent, just. But this the defendant should have provided against by asking for instructions better suited to the case. If they chose to withdraw their points, they assumed the very risk of which they now complain. This, perhaps, is enough to say about the complaint of mere ambiguity. If the judge had said nothing on the particular matter here involved, in the absence of any request to charge in a particular way, we would not reverse, as we have often said. By failing to pray instructions, we must infer that the party thought it best to risk what might be left unsaid rather than to call for special instruc-

tions. If he is injured by omitting to do so, it is his own error, which we do not sit to correct.

But if, from the language used by the judge, either on account of ambiguity or want of perspicuity, there is good reason to believe the jury have been misled as to the law, we ought to reverse. Error from such a source is not less pernicious than positive error from any other. The jury are entitled to reasonably clear and comprehensive instructions, wherever any ought to be given; and where they fall so far short of this as to induce a well-grounded belief of misapprehension on part of the jury, this is generally sufficient to call for a reversal.

But the instructions embraced in this assignment of error, though involved, were such, we think, as to have been understood by the jury. We have no good reason to suppose they were not. They assert that the plaintiff, at the time of the accident, was not in his proper place, and leave the fact to the jury to say whether this circumstance increased the danger of contact by the train with the cow, by the omission of the plaintiff to handle his brake, and whether his own injury was the result of his unauthorized change of position, or conduced to produce it, with a sufficiently clear direction that if these facts were affirmatively found, negligence was established against the plaintiff, and he would not be entitled to recover. This we think the jury could not fail to understand to be the meaning of the charge. If so, was it right in principle?

It is true, as argued for the plaintiff in error, that all the risk of an unauthorized change of position by the plaintiff on the train was assumed by him, and he was bound to abide it. If it conduced to produce the injury, although the defendant may have been guilty of negligence at the same time, it would deprive him of all right to compensation, the fault being, partly at least, his own. But if it had no immediate connection whatever with the agency producing the injury, it would be strange justice to impute to it the like effect as if it had. That must necessarily be the conclusion in every case if the question is not for the jury to ascertain whether the acts of the plaintiff at the time have, or have not, been such as to have conduced to the injury. That is the rule, undoubtedly, in relation to passengers carried by rail, and was what the learned judge referred to the jury in the instruction complained of. If this was a proper inquiry for the

jury, no error was committed in referring it to them. That this was his meaning we readily discover from his language; and I know of no rule by which we are bound to presume the jury did not understand, and were misled by it. The result of their verdict, under the testimony, falls far short of establishing this. The plaintiff in error avers, in his pleadings in this court, that there is error here, and he is bound to prove it. We must have more than suspicion of error upon which to base our action. If language has a meaning comprehensible by us we ought, it being untechnical, to presume it was comprehended in the same way by the jury until the contrary be made to appear. That has not been done in the argument on this point.

The question whether the injury to the plaintiff resulted in any degree from his own acts or omissions, we think was plainly enough referred to the jury, with a sufficiently decided expression that if it was, he was not entitled to recover damages from the company; that if his negligence or misconduct contributed to his own injury, he must blame himself. This was, in substance, the instruction, and there was nothing in it of which the defendant can complain.

The counsel for the plaintiff in error seem to confound the duty resting on a passenger with the law of contract, wherein, if the party do not comply, he is not entitled to the stipulated compensation. This is not correct, to the full extent. Strictly, a passenger is only entitled to enjoy the seat he pays for. But, if he be injured while passing about in the car, or standing up, unless such acts contribute to the injury, he will be entitled to be compensated if it resulted from the negligence of the carriers, although he was out of his seat. If a passenger puts himself out of place, and in a place of danger, and is injured as the result, this is *damnum absque injuria*, and he cannot recover. This results rather from the law of carriers than from a breach of contract. If the contract were to control exclusively, then any breach would defeat the injured party, without regard to the effect of contributory acts. The duty to avoid risks, or unauthorized acts, I admit, grows out of a contract relation between the carrier and passenger so far as to prevent a recovery on account of them, but not so far as to prevent a recovery where fault is with the carrier and the breach of the duty arising out of the contract has not contributed to the injury. If no harm

ensues from the breach of the duty, no blame or loss ought to follow. If the plaintiff did not contribute to his own injury by being where he was, instead of where he had agreed to be, at the moment of the accident, this would prove that the accident was entirely independent of his agency. This was for the jury to ascertain from the evidence, and so it was submitted to them, and they have found the point in favor of the plaintiff, and allowed damages. It may be they might, with better justice, have come to a different conclusion. But if so, which we do not assert, we cannot correct it. Only in case of clear error can the court properly interfere with the verdict, the jury being constitutional triers, within their sphere, as truly as the court.

These views do not—at least they are not intended to—impinge upon the principle of the cases of *Railroad Company* v. *McCloskey*, 11 Harris 520; *McCully* v. *Clark & Thaw*, 4 Wright 406; nor *The Railroad Company* v. *Aspell*, 11 Harris 149. Indeed, we accord fully with them so far as their principles are applicable to the circumstances of this case. The cause of the injury here was in no way attributable to the plaintiff; but still it was a question whether his acts or position at the moment of the accident contributed to his own injury. That was a question for the jury, and we see no error in the charge in submitting it to them.

Judgment affirmed.

Superior Court of Cincinnati.

S. E. AMSINCK ET AL. *v.* WILLIAM HARRIS.

An order of attachment, issued by the clerk of this court, on an insufficient affidavit, is in effect "*coram non judice*," and therefore void, for the want of jurisdiction.

Where such an order is dismissed, or vacated by the court, the rule applicable to other judicial proceedings, where courts will not take jurisdiction, applies.

Therefore the dismissal of the order does not prevent a subsequent arrest for the same cause of action: the maxim "*bis vexari*" does not apply. A proceeding instituted where no jurisdiction exists, being void, it cannot be held to forbid another proceeding, neither as a bar or in abatement.

Caldwell & Forrest, for plaintiffs.

Gholson & Challen, for defendant.

The opinion of the court was delivered by

STORER, J.—This is a motion reserved from Special Term on the application of defendant, to dismiss an order of arrest, on the ground that the defendant had been once in custody for the same cause.

The facts appearing in the case are these:—

On the 31st day of March last, the plaintiff commenced his action in the court against the defendant to recover $14,000, which he claimed to be due to him for the price of merchandise sold; on the same day a summons was served upon the defendant to appear. An order for the arrest of the defendant was issued at the same time by the clerk of the court, on an affidavit filed by the plaintiff's agent, claiming under the Code the right to arrest the defendant for various fraudulent acts. On this order the defendant was taken into custody by the sheriff, and an application was subsequently made to one of our colleagues in Special Term to vacate the order, on the ground that the affidavit upon which the order issued did not conform to the requisitions of the Code; the motion was overruled, and the question as to the sufficiency of the affidavit was taken to the General Term upon error, where it was finally decided that the affidavit was insufficient to authorize the arrest, and the ruling in Special Term being thereupon reversed, the order of arrest was vacated, and the defendant discharged from custody.

After this the plaintiff filed another affidavit with the clerk, whereupon a second order of arrest was issued and the defendant taken into custody by the sheriff, after which an application was made by his counsel to a judge in Special Term to vacate the last order of arrest, on the ground that he could not be arrested a second time for the same cause, or in the same action; upon this motion, after argument, the questions involved were reserved for our opinion in General Term.

The question to be decided is, therefore, this,—can the last order of arrest be sustained?

The principle underlying the rule which is claimed to prohibit a second arrest, "*nemo debet bis vexari pro eadem causa*," applies equally to prevent the pending of two actions for the same cause, at the same time, as well as the commencement of another action after the first shall have been fully determined, and espe

cially protects a party when the plea of former conviction, or former acquittal, is interposed in a criminal proceeding.

It has its foundation among the oldest maxims of the common law, which has been incorporated, in its letter or spirit, into the constitutions of all the states of the Union.

No one shall be twice put in jeopardy for the same offence, is the germ from which, both in civil and criminal tribunals, from time to time, have sprung up the different modifications and applications of the ancient rule. To understand the true reason of the rule, it is proper to examine and ascertain definitely the meaning of the terms "twice in jeopardy."

It was formerly held in many of the states, that a party once indicted for a crime could not be charged a second time for the same offence, though there had been no trial upon the merits, as where the jury were discharged for disagreement, or the indictment was quashed, or the judgment arrested; but it is now held, we believe, in all the courts, that nothing short of an actual conviction or acquittal is a bar to a subsequent prosecution; and the same rule is observed in the trial of civil actions, without any exception; no judgment but a final one upon the merits can avail to defeat a second action.

Hence pleas to the jurisdiction, in abatement, as well as all dilatory pleas, as they determine nothing but the right of the court to try, or the propriety of process, cannot be considered as putting a party in jeopardy, within the reason of the principle to which we have alluded.

Chief Justice KENT, in *The People* v. *Olcott*, 2 Johns. Cases 301, and Judge SPENCER, in giving the opinion of the court in the celebrated case of *The People* v. *Goodwin*, 18 Johns. 200, have exhausted the law on the subject.

Since these decisions were made very many cases have arisen, both in England and in our own country, in which the courts have explained more fully the application of the rule we have discussed, with its various modifications.

They are very carefully collected by Mr. Wharton in the second volume of his excellent work on American Criminal Law, under the title of "Once in Jeopardy," §§ 572–591, and furnish an interesting topic for legal examination.

In order to sustain the plea of former acquittal, or conviction, the court who tried the case must have had jurisdiction, else

there has been no final determination of the matter litigated: *Rex* v. *Bowman*, 6 Carrington & Payne 337; *Com.* v. *Peters*, 12 Metcalf 387; *Marston* v. *Jenness*, 11 N. H. 156; *McCann's Case*, 14 Grattan 570.

If such is the law in relation to criminal offences, where life or limb may be in peril, we may readily trace the analogy of the principle to civil remedies.

In England from a very early day the subject of arrests, and discharge on common bail, has claimed very great attention where the courts have been asked to grant or restrain process.

There has not been until the reign of the present Queen any statutory provision defining the remedy, the right to arrest being always regulated by the circumstances of the case, and the discretion of the judges, who have always exercised in the special case their sound discretion. There never was, nor is there now, a general rule that is merely arbitrary without exception or limitation.

The cases referred to by counsel, when carefully examined, fully establish the fact, that even in those exceptional cases, where it would appear a second arrest was not consistent with the usual practice, it must be evident there is a disposition to harass and vex, rather than the honest pursuit of a legal right.

We find in the New York cases quoted in argument no well-established rule, but, rather, an hypothesis assumed, or proposed; not what we should respect as the exposition of a legal principle, while a series of decisions by the courts of that state have announced a rule, which, if it is sound, disposes without difficulty of any embarrassment there which nisi prius adjudications, and obiter dicta, may on first examination appear to have created.

Thus in *Matter of Faulkner*, 6 Hill 601, it was held by Judge BRONSON that the affidavit for process always gives jurisdiction to the court to grant it. In *Broadhead* v. *McConnell*, 3 Barb. 175, it was expressly decided, that if the warrant of arrest is issued without the proof required by statute, the warrant is void, no jurisdiction having attached to the officer who issued it.

The precise question came before our Superior Court in *Spice & Son* v. *Steinruck*, 14 Ohio State Rep. 221. "The authorities cited," say the court, "and a just and proper regard for personal liberty, constrain us to hold, that where a creditor seeks to arrest his debtor under section 20 of the Justices' Code, he must comply

with all the conditions thereby prescribed, and must, therefore, state in his affidavit, among other things, '*the facts claimed to justify belief* in the existence' of the fraudulent act and intention set forth as a ground for the order. That until this is done, the justice has no legal authority to issue such order, and that an arrest under an order unsupported by such an affidavit, will be held void in whatever form the question may arise."

We must conclude, then, that the first order of arrest issued in this action was inoperative and void, conferring no right upon the officer to arrest, and, of course, none upon the tribunal who granted it. Being a void process, it was equivalent to no process, and though it may have been the instrument by which the defendant was deprived for a time of his liberty, the right of the plaintiff in the action was never adjudicated. The decision of the court, therefore, in vacating the order, was simply a denial of jurisdiction on their part, and could not avail to protect the defendant in any subsequent litigation, or to deny to the plaintiff another order of arrest.

Neither in the letter nor the spirit of the rule, "that no one shall be twice vexed in the same action," do we think the defendant can demand its application on this motion.

He has been legally arrested but once; the first arrest was absolutely void.

The motion, therefore, to vacate the order before us must be overruled.

Supreme Court of Illinois.

REEDER ET AL. *v.* PURDY AND WIFE.
SAME *v.* PURDY.

The Illinois Statute of Forcible Entry and Detainer, by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful, and is a trespass for which an action of trespass will lie.

Where an action of trespass is brought for a mere entry by a landlord upon the possession of a tenant holding over, unaccompanied by any trespass upon either the person or personal property of the plaintiff, and merely constructively forcible, only nominal damages can be recovered; the *gravamen* of actions of this character being the trespass to the person and goods and chattels of the tenant.

The cases relating to the common-law right of an owner of land to enter forcibly upon the unlawful possession of another, collected and discussed.

The opinion of the court was delivered by

LAWRENCE, J.—These two cases, although separately tried, depend upon the same facts, and present similar questions, and it will be more convenient to dispose of both in one opinion.

In October 1862, Reeder, claiming to be the owner of a house occupied by Purdy and his wife, entered it, accompanied by the other appellants, for the purpose of taking possession. Purdy was not at home, Mrs. Purdy refused to leave, whereupon Reeder commenced putting the furniture out of doors. She resisted this, and he seized and held her by the wrists, while Baker, one of the co-defendants, continued to remove the furniture. This was somewhat damaged, and some slight injury was done to the wrists of Mrs. Purdy by the force applied in holding her. The appellants finally abandoned their attempt to take possession and withdrew.

Two actions of trespass have been brought—one by Purdy alone, and one by Purdy and wife jointly. The declaration in the suit brought by Purdy contains three counts: the first being for the assault upon his wife, the second for the injury done to the personal property, and the third for breaking his close and carrying off his furniture. The declaration in the suit of Purdy and wife contains two counts, both of which are for the assault upon his wife. There were pleas of not guilty, and an agreement that all defences might be made under them. A verdict for the plaintiff of $450 in one case, and of $500 in the other, was returned by the jury, and a judgment was rendered upon it, from which the defendants appealed.

It is insisted by the appellants that Reeder, being the owner of the premises, had a right to enter, and to use such force as might be necessary to overcome any resistance, and that he cannot be made liable as a trespasser, although it is admitted he might have been compelled to restore to Purdy, through an action of forcible entry and detainer, the possession thus forcibly taken. The court below instructed otherwise, and this ruling of the court is assigned for error.

We should not consider the question one of much difficulty, were it not for the contradictory decisions in regard to it, and we must admit that the current of authorities, up to a comparatively-recent period, is adverse to what we are firmly convinced must be declared to be the law of this state. But the rule cannot be

said to have been firmly or authoritatively settled even in England, for ERSKINE, J., observes in *Newton* v. *Harland*, 1 Man. & Gr. 644 (39 E. C. L. R. 952), that "it was remarkable a question so likely to arise, should never have been brought directly before any court *in banc* until that case." This was in the year 1840, and all the cases prior to that time, in which it was held that the owner in fee could enter with a strong hand, without rendering himself liable to an action of trespass, seem to have been merely at *nisi prius*, like the oft-quoted case of *Taunton* v. *Costar*, 7 T. R. 431. Still, this was the general language of the books. But the point had never received such an adjudication as to pass into established and incontrovertible law, and a contrary rule was held by Lord LYNDHURST in *Hilary* v. *Gay*, 6 C. & P. 284 (25 E. C. L. R. 398). But in *Newton* v. *Harland*, already referred to, the Court of Common Pleas gave the question mature consideration, and finally held, after two arguments, that a landlord who should enter and expel by force a tenant holding over after expiration of his term, would render himself liable to an action for damages. But the later case of *Meriton* v. *Combs*, 67 E. C. L. R. 788, seems to recognise the opposite rule, and we must therefore regard a question which one would expect to find among the most firmly settled in the law, as still among the controverted points in Westminster Hall.

In our own country there is the same conflict of authorities. In New York it has been uniformly held, that under a plea of *liberum tenementum* the landlord, who has only used such force as might be necessary to expel a tenant holding over, would be protected against an action for damages: *Hyatt* v. *Wood*, 4 J. R. 150; *Ives* v. *Ives*, 13 Id. 235. In *Jackson* v. *Farmer*, 9 Wend. 201, the court, while recognising the rule as law, characterizes it as "harsh, and tending to the public disturbance and individual conflict." Kent in his Commentaries states the principle in the same manner, but in the later editions of the work reference is made by the learned editor, in a note to the case of *Newton* v. *Harland*, above quoted, as laying down "the most sound and salutary doctrine." In *Tribble* v. *Frame*, 7 J. J. Marsh. 598, the court hold that, notwithstanding the Kentucky statute of forcible entry and detainer, the owner of the fee, having a right of entry, may use such force as may be necessary to overcome resistance, and protect himself against an action of

trespass, under a plea of *liberum tenementum*. On the other hand, the Supreme Court of Massachusetts has held that, although trespass *quare clausum* may not lie, yet in an action of trespass for assault and battery, the landlord must respond in damages, if he has used force to dispossess a tenant holding over. The court say "he may make use of force to defend his lawful possession, but being dispossessed, he has no right to recover possession by force, and by a breach of the peace:" *Sampson* v. *Henry*, 11 Pick. 379. See, also, *Ellis* v. *Page*, 1 Id. 43; *Sampson* v. *Henry*, 13 Id. 36; *Meade* v. *Stone*, 7 Met. 147, and *Moore* v. *Boyd*, 24 Maine 242. But by far the most able and exhaustive discussion this question has received, was in the case of *Dustin* v. *Cowdry*, 23 Vt. 635, in which Mr. Justice REDFIELD, delivering the opinion of the court, shows by a train of reasoning which compels conviction, that, in cases of this character, the action of trespass will lie. And he also says "whether the action should be trespass *quare clausum*, or assault and battery, is immaterial, as under this declaration, if the defendant had pleaded soil and freehold, as some of the cases hold, the plaintiff might have new assigned the trespass to the person of the plaintiff, and a jury, under proper instructions, would have given much the same damages, and upon the same evidence, in whatever form the declaration is drawn."

In this conflict of authorities, we must adopt that rule which, in our judgment, rests upon the sounder reason. We cannot hesitate, and were it not for the adverse decisions of courts which all lawyers regard with profound respect, we should not deem the question obscured by a reasonable doubt. The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The Statute of Forcible Entry and Detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie. It is urged that the only remedy is that given by the statute—an action for the recovery of the possession. But the law could not expel him who has entered, if his entry was a lawful entry, and if not lawful, all the consequences of an unlawful act must attach to it, one of which is a liability for whatever damages have been done to him whose possession has

been forcibly invaded. The law is not so far beneath the dignity of a scientific and harmonious system, that its tribunals must hold in one form of action, a particular act to be so illegal that immediate restitution must be made at the costs of the transgressor, and in another form of action, that the same act was perfectly legal, and only the exercise of an acknowledged right.

It is urged that the owner of real estate has a right to enter upon and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant, and hence the common-law right to use all necessary force has been taken away. He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. The remedy must be sought through the peaceful agencies which a civilized community provides for all its members. A contrary rule befits only that condition of society in which the principle is recognised that

> "He may take who hath the power,
> And he may keep who can."

If the right to use force be once admitted, it must necessarily follow, as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life.

The wisdom of confining men to peaceful remedies for the recovery of a lost possession is well expressed by Blackstone, Book 4, p. 148: "An eighth offence," he says, "against the public peace is that of a forcible entry and detainer, which is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances, which were explained more at length in a former book. But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on with force, violence, and unusual weapons."

In this state it has been constantly held that any entry is forcible, within the meaning of this law, that is made without the consent of the occupant.

We state, then, after a full examination of this subject, that, in our opinion, the statutes of forcible entry and detainer should be construed as taking away the previous common-law right of forcible entry by the owner, and that such entry must be therefore held illegal in all forms of action.

There are, however, some minor points upon which both of these judgments must be reversed. In the suit brought by the husband alone the court refused to instruct the jury that the plaintiff could not recover for any damages to the real estate. This instruction should have been given. Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from the invasion of his possession, or from injuries done to his person or property, and such exemplary damages as the jury may think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has title, except so far as damages directly result to him through the forcible disturbance of his possession. It would be a startling doctrine to hold that the wrongful occupier of land could make the owner thereof respond to him in damages for timber that the owner might cut upon the premises. This point was decided by this court in *Hoots* v. *Graham*, 23 Ills. 82, to the decision in which case we fully adhere.

In the case brought by Purdy, the court, after telling the jury they could give exemplary damages, gave the following instruction for the plaintiff: "In estimating the amount of exemplary damages, if they find any, the jury have a right to take into consideration the unlawful purpose for which defendants were together, if any is proven; the force and violence with which they attempted to carry out that purpose; the wantonness of the attack upon the premises, family, and property of the plaintiff, if the proof show any such; and the wilfulness of the defendants in doing the acts, if the evidence show any such."

The suit brought by Purdy and wife had been already tried, and in that suit the jury had been instructed they might give exemplary damages, and they had undoubtedly given them. The record of that suit was in evidence on the trial of the second

suit. The court refused the instructions asked by the defendant, and properly, in the form they were drawn, except as to the one already considered. Neither is there anything in itself wrong in the foregoing instruction, and yet it is of such a character that the court, in order to secure a fair consideration of the case by the jury, and having refused all the instructions drawn by the defendant, should, of its own motion, have modified the somewhat argumentative effect of this one, by telling the jury that they were also, in estimating the exemplary damages, to consider the fact that the jury in the other suit had been authorized to give exemplary damages, and to take into consideration on that question the amount of the verdict in the other case. We must hold that, in strict law, exemplary damages are recoverable in both cases, because the suits are brought in different rights. In the suit by Purdy and wife, if Purdy fails to collect the judgment in his lifetime, on his death it would go to the wife surviving him, and not to his personal representatives. But, apart from that contingency, the fruits of both judgments go into his pocket. It would therefore be highly proper that the jury, in considering the question of damages, should have taken into consideration, not only the circumstances of aggravation enumerated in the instruction, but also the fact that these same circumstances, and the same transaction, had been submitted to another jury in a suit prosecuted in reality for the benefit of the same plaintiff, and, so far as related to the single question of the amount of vindictive damages, the amount of the former verdict would have been a proper subject of regard.

The jury were also told in the third instruction for the plaintiff at the suit of Purdy, that the fact that the defendant was the owner, and entitled to the possession of the premises occupied by plaintiff, could not be regarded by the jury in mitigation of any actual damages caused to the plaintiff by the assault and force. This is undoubtedly true, so far as actual damage was concerned, but it would not be true in regard to exemplary damages, unless we are prepared to say that it is as inexcusable for a person to attempt to recover his own property by force, as it would be to rob another of property to which the assailant has no claim. This would not be contended; and while therefore the third instruction was strict law, yet, in connection with the other instructions, in regard to exemplary damages, and unexplained

by anything in behalf of the defendant, we think the jury would be likely to be misled. This is more especially true in regard to the suit of Purdy and wife; for, in the third instruction for the plaintiff in that suit, the jury are told the same thing as to the damages, but the word *actual* is left out. These instructions should have been so modified that the jury would clearly understand, on the question of vindictive damages, they would have a right to regard the fact that the plaintiff was the owner, and entitled to the possession of the property—a fact proven in the case.

This last objection applies equally to the instructions in both cases. The others, above considered, apply only to the suit of Purdy. There is, however, another fatal objection to the judgment in favor of Purdy and wife. Both counts in that declaration are for injuries done to the person of the wife. A suit could not have been maintained in their joint names for injuries done to the property of Purdy. Yet the court, against the objections of defendants, allowed the plaintiff to give in evidence the injury done to the furniture. This was wholly inadmissible, except so far as might be necessary to explain the assault on the person of the wife; and in a case of this character, notwithstanding the instructions given for the defendants, this evidence would have a strong tendency to improperly prejudice them in the minds of the jury.

In order to prevent misapprehension, we would say, in conclusion, that for a mere entry by the landlord upon the possession of a tenant holding over, unaccompanied by any trespass upon either the person or personal property of the plaintiff, and merely constructively forcible, only nominal damages could be recovered. The *gravamen* of actions of this character is the trespass to the person and goods and chattels of the tenant. If, for example, a tenant of a house should remove his family and furniture at the end of the term, but refuse, without reason, to surrender the key to his landlord, and still claim the possession, the landlord might nevertheless force the door of his vacant house without incurring a liability to more than nominal damages. He would be liable to an action of forcible entry and detainer, and to an action of trespass in which nominal damages would be recovered, because the entry would be unlawful, but to nothing more. But for an entry while the house is still occupied by the family and furniture